

Town of Amherst
Zoning Board of Appeals - Special Permit
DECISION

Applicant: Peter MacConnell (for Bank of America)
6 South East Street, Amherst, MA 01002

Owner: BayBank Valley Trust Co. (c/o Bank of America Corp. Realty)
101 North Tryon Street/NC1-001-03-81, Charlotte, NC 28255

Date Application filed with the Town Clerk: July 3, 2007

Nature of request: Petitioner seeks a Special Permit under Section 9.22 of the Zoning Bylaw to reconstruct and operate a drive-through ATM to replace the teller operated drive-through ATM destroyed by fire.

Location of property: 75 East Pleasant Street, Map 11C, Parcel 322, B-L zone.

Legal notice: Published in the Daily Hampshire Gazette on July 11 and July 18, 2007, and sent to abutters on July 10, 2007

Board members: Thomas Simpson, Russell Frank and Albert Woodhull

Submissions:

The applicant submitted the following documents:

- A set of plans, dated January 26, 2007, revised April 4, 2007, prepared by Cavanaro Consulting, including the following:
 - Econ and Demo Plan – ECD
 - Proposed Site Plan – SP1
 - Landscape and Lighting Plan – LLP
 - Foot-candle Plan – dated April 11, 2007
 - Proposed Traditional ATM Kiosk – Exterior Perspectives
 - Proposed Traditional ATM Kiosk – Material Specs
 - Amherst Remote ATM Building – Elevations – dated April 12, 2007
 - Kiosk Signage – Elevations & Details
 - Typical Site Lighting – Specification, Minimum Standards
- A document entitled “Zoning Hearing Worksheet” responding to the criteria listed in Section 10.38 of the Zoning Bylaw;
- A Management Plan

Town of Amherst staff submitted the following documents:

- A memorandum from the Fire Department dated July 10, 2007, commenting on access to the site;
- A memorandum from the Planning Department dated July 18, 2007, commenting on the application;
- An email from Gary Brackett, Interim Town Counsel, dated June 15, 2007, providing an opinion on the required permitting process;
- A Record of Decision on a Planning Board Special Permit, SPP2007-00002, in which the Planning

Board failed to approve the drive-up automated teller machine;

- A Record of Decision on a Planning Board Site Plan Review, SPR 2007-00010, in which the Planning Board approved the site plan for a kiosk containing a drive-up and two walk-up Automated Teller Machines.

Site Visit: July 18, 2007

At the site visit the Board was met by the applicant, Peter MacConnell, and later joined by Carol Fita, Assistant Vice-President and Branch Manager. The Board observed or noted the following:

- The location of the site at the busy intersection of two streets (East Pleasant St. and Triangle St.);
- The surrounding neighborhood, consisting of businesses to the south, some shops immediately to the east along Triangle Street and a residential district to the north, east and west;
- The concrete slab and steel frame in the center of the site, where the new ATM kiosk is being built, approximately in the same location as the bank building that had been destroyed by fire;
- The location of a temporary bank trailer and ATM facility, just north of the proposed location;
- A large red-leaved Norway Maple in the center of the site;
- The parking lot that is currently shared by the bank property and the shops to the east;
- The proposed location of the new landscape island, just beneath the temporary bank trailer, where pavement will be removed and soil added to accommodate the new plantings;
- Two drive-through teller ATMs adjacent to the site that share the same parking lot;
- Vehicular access from East Pleasant Street, Triangle Street and Cottage Street;
- The approximate location of the new drive-through automated teller machine and access driveway.

Public Hearing: July 26, 2007

At the public hearing, Attorney Peter MacConnell, representing Bank of America, presented the petition and made the following comments:

- The applicant is requesting permission to re-establish a pre-existing non-conforming use at the site;
- One year ago, on August 25, 2006, the building on this site, including the existing drive-through ATM, burned down;
- The applicant wishes to re-establish the non-conforming use in the same spot with the driveway in the same location;
- The size of the principal building is the only difference;
- When the drive-through was originally built, the use was considered a “by-right” use;
- In Spring, 2006, Town Meeting changed the Bylaw to require that drive-through ATMs receive a Special Permit in the B-L zone;
- The original drive-through ATM use was thus made non-conforming;
- According to Section 9.22 of the Zoning Bylaw the Zoning Board of Appeals may allow a change in a non-conforming use if it is not substantially more detrimental to the neighborhood than the existing non-conforming use;
- The applicant is altering the building to which the drive-through is accessory, by making it smaller and changing it from a full-service bank to an automated bank;
- The drive-through will be the same, and in the same location as it was prior to the fire;
- The proposal meets all of the requirements of Section 10.38 of the Zoning Bylaw;
- The applicant has filed a response to each subsection of Section 10.38;
- The primary criterion of Section 9.22 is whether the proposal is substantially more detrimental to the neighborhood than the pre-existing non-conforming use; the applicant states that it is not substantially more detrimental;
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- The proposal has received Site Plan Review approval from the Planning Board, including plantings, arrangement of site improvements, etc.

Mr. MacConnell introduced other members of his party who, along with him, were representing the Bank of America. These individuals included: Donna Perkett, Location Planner, Frank Cefali of C.B. Richard Ellis Property Management and Carol Faita, Assistant Vice-President and Branch Manager.

Mr. Simpson asked when the original building had been erected. Bonnie Weeks, Building Commissioner, stated that the original building had been erected in the early 1980's. Mr. Simpson noted that the pre-existing building had been in place for almost 25 years.

Mr. MacConnell stated that the drive-through facility had been there since the beginning, although it had not always been an ATM.

Mr. Woodhull asked if the Zoning Board of Appeals could over-rule the decision of the Planning Board in which they did not approve the Special Permit. Mr. Simpson explained that the Planning Board had decided not to pass judgment on the proposal and that they had not reached the super-majority needed to approve the Planning Board Special Permit.

Mr. Woodhull commented that the proposed kiosk was not the same business as a full-service bank.

Mr. Frank asked "What will be there?" Mr. MacConnell stated that there will be two (2) ATMs inside the structure which is currently being built and one (1) drive-through ATM outside. The drive-through has not yet been approved. The Planning Board has approved the building and site work associated with the ATM kiosk, but the drive-through has not yet been approved.

Mr. Frank asked "What was there prior to the fire?" Mr. MacConnell stated that there had been a wood-frame building with three (3) ATMs inside, one (1) drive-up ATM teller line, a customer service desk and eight (8) employees. He focused the Board's attention on the drive-through. Mr. MacConnell noted that customers like the drive-through. It is convenient for late-night banking and for people with children, for disabled people and for the elderly. Mr. MacConnell commented that he did not think that a permit was needed to re-build the structure.

Mr. Simpson asked that the Board look at paragraph #2 of the email from Interim Town Counsel, which states that "The walk-up ATM was part of the original structure and, in the absence of any specific definition of the term 'bank' in the Bylaw, may now be considered to be the principal use of the property."

Mr. Woodhull stated that in his opinion the drive-through ATM would really be the main use of the structure, not the accessory use. He noted potential problems with pollution from car exhaust and additional traffic. He objected to Amherst becoming a "drive-through" facility.

Mr. MacConnell reiterated the convenience of drive-through ATMs for elderly and disabled people and people with children. He noted that there are three (3) drive-through ATMs operated by other banks nearby. He stated that it will not be more detrimental to the neighborhood than the previously existing structure. Mr. Woodhull noted that those three (3) drive-through ATMs are each part of a "real bank". Mr. Woodhull further commented that he was not pleased to see a "robot" replace a real business. He stated that a "real" business could be located on this site.

Christine Brestrup, Senior Planner, clarified the decision of the Planning Board on the Special Permit, stating that the Planning Board had not taken a vote on a motion to deny the Special Permit. They had failed to reach the proper number of votes to approve the Special Permit because a Special Permit needs a super-majority of six (6) Planning Board members. The one Planning member who abstained believed that the applicant should follow the advice of the Interim Town Counsel and apply to the ZBA for a Special Permit.

Carol Faita, Branch Manager for Bank of America, stated that she had been in her job for seven and one-half years. She stated that the elderly and disabled customers and mothers with children miss the drive-through. The drive-through was the most heavily-used part of the old bank.

Jessica Mix-Barrington, 39 Pine Street, stated that there will be lots of cars there if the drive-through is approved.

Pam Rooney, 42 Cottage Street, stated that her backyard abuts the parking lot of the bank. Her family has been long-term customers of the bank and they have been well-served by the staff. Although she will be sad to see the staff go she does not believe that there will be an increase in traffic to the site that will contribute to traffic problems as a result of the drive-through. People may leave their automobiles running in winter. Overall, having a drive-through will not be detrimental to the neighborhood.

Mr. Frank MOVED to close the evidentiary portion of the public hearing. Mr. Woodhull SECONDED the motion. The Board VOTED unanimously to close the evidentiary portion of the public hearing.

Public Meeting – Discussion

Mr. Simpson opened the discussion by stating that, in his mind, this is a renewal of a use that has existed for 25 years. If the fire had happened 3 months earlier (before the Bylaw changed for drive-through facilities in 2006) the facility would have been rebuilt by right. Section 9.23 allows for reconstruction within two years without a Special Permit if the structure is rebuilt in the same portion of the lot and used as it was before. The proposed use in this case is not different in character or in its effect on the neighborhood. Also, the proposal is not detrimental to the neighborhood, and in fact, the use will be less than before. The building will be a kiosk, not a full service bank.

Mr. Frank agreed with Mr. Simpson, saying that he has no objection to the proposal. In fact, he is not sure if the bank even needs a Special Permit to reconstruct the drive-through, given Section 9.23 of the Bylaw. The proposed use is a bank, and will continue as a bank. The nature of banking has changed through the years, and, if needed, there is a full service Bank of America just down the street.

Mr. Frank said that he has a personal opinion about the proposal, but it is not relevant. What is relevant is how the proposal fits with the Zoning Bylaw.

Mr. Simpson added that 25 years ago, internet banking didn't exist, much less ATMs. Now many people do most of their banking transactions online.

Mr. Woodhull said that the proposal is not the same business that it was. If the automated facility closes at this location, then a kiosk would remain that would not be usable for another business. Also, he personally dislikes drive-ups.

Mr. Woodhull said he would prefer a different entrance than the one off East Pleasant Street. Most of the traffic to the drive-up and the several other businesses at that location come from the west at the curb cut which is almost at the corner of East Pleasant and Triangle Streets. Thus the traffic both entering and leaving

the drive-up would have to go against traffic, especially in returning to East Pleasant Street. He would prefer the access to the drive-up facility to be from the west, exiting to the east.

And the problem isn't just the entering traffic, Mr. Woodhull said. There can be outgoing traffic backed up if some one wanting to cross E. Pleasant to get to N. Pleasant and UMass is waiting for southbound traffic on E. Pleasant stopped at the light. Under these conditions there can be cars backed up in the outbound lane from the parking lot and someone trying to get into that lane from the ATM will block incoming cars, which in turn blocks northbound traffic on E. Pleasant. It's really a bad design, it shouldn't have been allowed originally, he said. In general, the proposed traffic flow is not good, and will get worse in the future. The intersection of East Pleasant and Triangle Streets is already dangerous.

Attorney MacConnell said that there is no other drive-through ATM for Bank of America. The Route 9 bank has a drive-through, but with a teller at the window.

Mr. Woodhull repeated that he does not like the proposal, but he stated that he will not vote against it.

Mr. Simpson moved on to the Findings of Section 10.38 and possible conditions if the permit were to be granted. The Board reviewed the findings submitted by Attorney MacConnell and agreed with his interpretation of Section 10.38. The Board further agreed that the conditions for granting the Special Permit would be limited; with no personnel, the hours of operation would be 24 hours per day, seven days a week, there would be no litter, etc.

Public Meeting – Findings:

Under Section 9.22 of the Zoning Bylaw, Non-Conforming Uses and Structures, the Board found that the proposed use will not be substantially different in character or in its effect on the neighborhood or on the property in the vicinity and will not be substantially more detrimental to the neighborhood than the pre-existing non-conforming use.

Under Section 10.38 of the Zoning Bylaw, Specific Findings required of all Special Permits, the Board found that:

10.380 & 10.381 – The proposal is suitably located in the neighborhood in which it is proposed, and is compatible with surrounding uses, because the site is located in the B-L (Limited Business) Zone and is adjacent to a restaurant, a convenience store, two banks and several offices. There are other drive-through facilities in the vicinity. The site is at the intersection of two major roadways, Triangle Street and East Pleasant Street.

10.382 and 10.385 – The proposal would not constitute a nuisance and protects the adjoining premises against detrimental or offensive uses because the use does not produce any pollution, odor, dust or vibration. The external lights are suitable for the surrounding neighborhood because of conditions attached to the Site Plan Review approval by the Planning Board. The adjoining premises are protected by landscaping and the use will be less intensive than the previous use.

10.383 and 10.387 – The proposal would not be a substantial inconvenience or hazard to abutters, vehicles or pedestrians because the drive-through has operated in this fashion safely for over 20 years.

10.384– Adequate and appropriate facilities would be provided for the proper operation of the proposed use because the drive-through is of appropriate size and configuration for the use. There is adequate parking, water, sewer and electricity for the operation of the drive-through facility.

10.386 – The proposal ensures that it is in conformance with the Parking and Sign regulations of the Bylaw because the proposal has adequate parking, including universally-accessible spaces, for the expected number

of customers and the signs on the walls will be less than 10% of the wall area, in accordance with the conditions of the Site Plan Review approval by the Planning Board.

10.388 – The proposal ensures adequate space for the off-street loading and unloading of vehicles, goods, products, materials and equipment because the building is small and lot is large with adequate parking.

10.389 – The proposal provides adequate methods of disposal and/or storage for refuse and other wastes because the site will be visited each day by bank personnel to be certain that it is clean and any and all debris is removed.

10.392 – The proposal provides adequate landscaping because it has been reviewed and approved as part of the Site Plan Review approval by the Planning Board.

10.393 – The proposal provides protection of adjacent properties by minimizing the intrusion of lighting because the lighting plan shows lights of a size and scale suitable for the site and will not intrude on neighboring properties and the lighting plan has been reviewed and approved as part of the Site Plan Review approval by the Planning Board.

10.395 – The proposal does not create disharmony with respect to the terrain and to the use, scale and architecture of existing buildings in the vicinity because the building is brick and glass, similar to Bertucci's Restaurant across the street and the adjacent businesses.

10.398 – The proposal is in harmony with the general purpose and intent of the Bylaw because it promotes the health, safety, convenience and general welfare of the inhabitants of the Town of Amherst. It will provide a service for both students and citizens of the Town.

Public Meeting – Zoning Board Decision

Mr. Frank made a motion to APPROVE the application, with conditions. Mr. Simpson seconded the motion.

For all the reasons stated above the Board VOTED unanimously to grant a Special Permit under Section 9.22 of the Zoning Bylaw to reconstruct and operate a drive-through ATM to replace the drive-through ATM destroyed by fire, at 75 East Pleasant Street (Map 11C, Parcel 322, B-L Zone), as requested in the application submitted by Attorney Peter MacConnell for Bank of America, with conditions.

THOMAS SIMPSON

RUSSELL FRANK

ALBERT WOODHULL

FILED THIS _____ day of _____, 2007 at _____,
in the office of the Amherst Town Clerk _____.

TWENTY-DAY APPEAL period expires, _____ 2007.

NOTICE OF DECISION mailed this _____ day of _____, 2007
to the attached list of addresses by _____, for the Board.

NOTICE OF PERMIT or Variance filed this _____ day of _____, 2007,
in the Hampshire County Registry of Deeds.

Town of Amherst
Zoning Board of Appeals

SPECIAL PERMIT

The Amherst Zoning Board of Appeals hereby grants a Special Permit under Section 9.22 of the Zoning Bylaw, to reconstruct and operate a drive-through ATM to replace the drive-through ATM destroyed by fire, at 75 East Pleasant Street (Map 11C, Parcel 322, B-L Zone), as requested in the application filed by Attorney Peter MacConnell for Bank of America, with the following conditions:

1. The structure and site improvements shall be constructed in accordance with the plans approved by the Planning Board on June 20, 2007.

THOMAS SIMPSON, Chair
Amherst Zoning Board of Appeals

DATE